STATE OF WISCONSIN
BEFORE THE ELECTION COMMISSION

TIMOTHY ZIGNEGO, DAVID OPITZ
and FREDERICK LUEHRS, III

COMPLAINANTS

v.

MARGE BOSTELMANN, JULIE GLANCEY,
ANN JACOBS, DEAN KNUDSEN and
MARK THOMSEN, in their official capacities
as members of the WISCONSIN ELECTION
COMMISSION

DEFENDANTS

COMPLAINT

The complainants, Timothy Zignego, David Opitz and Frederick Luehrs, III, allege as
follows based upon their information and belief:

1. Each Complainant is a registered Wisconsin voter and qualifies as an elector within
the meaning of Chapters 5 and 6 of the Wisconsin Statutes. Mr. Zignego resides in Washington
County. Mr. Opitz resides in Ozaukee County. Mr. Luehrs resides in Waukesha County.

2. The defendants, Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudsen and
Mark Thomsen are the commissioners of the Wisconsin Election Commission (“WEC”), a
governmental agency created under Wis. Stat. §5.05 and as commissioners have the responsibility
for the administration of Chapters 5 and 6 of the Wisconsin Statutes and other laws relating to
elections and election campaigns, other than laws relating to campaign financing.

3. Each of the commissioners is an “election official” within the meaning of Chapters
5 and 6 of the Wisconsin Statutes and is sued in that capacity. A sixth commissioner, Jodi Jensen,
was involved in the matters that form the basis for this case but Ms. Jensen has since resigned from
WEC and, thus, is not named as a Respondent herein. The commissioners shall be referred to collectively herein as “the WEC Commissioners.”

JURISDICTION

4. This case is brought against the WEC Commissioners under Wisconsin Statute § 5.06 Wis. Stats. which provides that:

Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections is contrary to law, or the official has abused the discretion vested in him or her by law with respect to any such matter, the elector may file a written sworn complaint with the commission requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law.

NATURE OF ACTION

5. By statute, Wisconsin now participates in what is called the Electronic Registration Information Center (“ERIC”). ERIC is a multi-state cooperative that shares information regarding voter registration.

6. As part of ERIC, Wisconsin receives a report regarding what are sometimes referred to as “Movers.” This refers to Wisconsin residents who, in an official government transaction, have reported an address different from their voter registration address. ERIC receives this information for Wisconsinites from several sources including the U.S. Post Office and the Wisconsin Department of Motor Vehicles.

7. After receiving the report on Movers from ERIC, WEC undertakes an independent review of the “Movers” information to ensure its accuracy and reliability.

8. Once WEC reviews the information from ERIC, then as required by Wisconsin law, WEC sends a notice to those voters, at the address on their voter registration, and asks them to
affirm whether they still live at that address. If the voter affirms that he or she has not moved, then nothing happens and the voter remains in the active status on the voter rolls at that address.

9. The issue raised in this complaint is what happens if a voter who receives such a notice does not respond to the notice.

10. Wisconsin law is clear on that question. Wis. Stat. § 6.50(3) states that:

   Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector’s registration address stating the source of the information. All municipal departments and agencies receiving information that a registered elector has changed his or her residence shall notify the clerk or board of election commissioners. **If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector’s registration from eligible to ineligible status.** Upon receipt of reliable information that a registered elector has changed his or her residence within the municipality, the municipal clerk or board of election commissioners shall change the elector’s registration and mail the elector a notice of the change. This subsection does not restrict the right of an elector to challenge any registration under s. 6.325, 6.48, 6.925, 6.93, or 7.52 (5). (Emphasis added)

11. Despite the mandatory language in the statute, the WEC Commissioners decided at their June 11, 2019 meeting that WEC would not change the voter’s registration from eligible to ineligible status until somewhere between 12 months and 24 months after the notice was mailed and not responded to, rather than in 30 days as required by the statute. This decision by the WEC Commissioners was contrary to law and an abuse of discretion.

12. The WEC Commissioners do not have the power to set aside the policy decision of the Wisconsin Legislature in this regard and do not have the power to create election law for the State of Wisconsin.

13. WEC, itself, has been granted rule-making power by the Legislature under Wis. Stat. § 5.05(1)(f) to “promulgate rules under ch. 227 applicable to all jurisdictions for the purpose
of interpreting or implementing the laws regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensuring their proper administration.”

14. However, when exercising that rule-making power on behalf of WEC, the WEC Commissioners must comply with Chapter 227 of the Wisconsin Statutes.

15. Here, the WEC Commissioners have contravened the will of the Legislature and created new election law policy for the State by simply voting on such a new policy in a motion at a WEC meeting (which is certainly not the procedure required for rule-making under Chapter 227), all of which conduct is contrary to law and an abuse of discretion.

THE ERIC MOVERS REPORT IS RELIABLE.

16. As cited above, Wis. Stat. § 6.50(3) states that “[u]pon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector’s registration address stating the source of the information.”

17. Whether the ERIC Movers report is reliable is a question of law but the following facts strongly support the legal conclusion that the report is reliable.

18. The statute, itself, provides that any voter who receives a notice can continue their registration at their existing address by responding to the notice and informing WEC that the voter has not moved. Thus, the statute, on its face, assumes that some voters who have not moved will nevertheless receive a notice under the statute. The Legislature did not require certainty that the voter has moved prior to sending notice to the voter, only the existence of reliable information.

19. “Reliable” means something that is “consistently good in quality or performance or able to be trusted.” [link to Lexico definition]
20. It is the Wisconsin Legislature, itself, that made the decision to join ERIC. See, Wisconsin Statute § 6.36(1)(ae).

21. The very reason that the Legislature determined that Wisconsin would join ERIC (and pay the required dues) is because ERIC is widely considered as a reliable source of information to be used by its member states (there are currently 29 states that are members) to update and improve the accuracy of their voter rolls.

22. The Legislature made that decision on behalf of the State of Wisconsin because the information to be received from ERIC was consistently good in quality such that it could be trusted.

23. Moreover, as confirmed by ERIC’s own website, the reports that ERIC provides to its member states include “reports that show voters who have moved within their state, voters who have moved out of state, voters who have died, duplicate registrations in the same state and individuals who are potentially eligible to vote but are not yet registered.” (Emphasis added.)

24. That is, one of the known benefits of joining and paying dues to ERIC is to receive a Movers Report from ERIC.

25. Further, the information contained in ERIC’s Movers Report is information reported by the voter (and not a third party) in an official government transaction. The source of the information makes the information reliable.

26. Moreover, Wisconsin’s history with ERIC shows that the ERIC Movers Report is accurate.

27. WEC received a Movers report from ERIC in October 2017.

28. WEC staff reviewed and vetted that report before taking any action on the report. See, WEC Staff Report for March 11, 2019 meeting ("March 11th Staff Report") ("Before any action was taken regarding these voters [identified in the ERIC Movers report], Commission staff..."

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vetted the list for changes that were not relevant to the voter’s registration, such as changes to mailing addresses or temporary changes.”) A true and correct copy of the March 11th Staff Report is attached hereto as Exhibit A.


30. The notice was in the form of a postcard directing the voter to sign and return the postcard if the voter desired to continue voting at the address on the postcard or to visit myvote.wi.gov to update their voter registration. A true and correct copy of an exemplar of the November 2017 notice is attached hereto as Exhibit B.

31. Of these 341,855 voters, only 6,153 responded to the notice by continuing their registration at their existing address. (March 11th Staff Report, Ex. A.)

32. The remainder (335,702) were deactivated from the voter registration list as required by law. See, Wis. Stat. § 6.50(3).

33. Ultimately, 18,117 of the 335,702 voters whose registration status was deactivated were reactivated based upon one of the following: (1) the voter contacted their municipal clerk or WEC and stated that they still resided at the address on their voter registration, (b) WEC staff found an error of some sort, or (c) the voter voted in an election in 2018 from the address on their voter registration. (March 11th Staff Report, Ex. A.)

34. The total of the voters who returned the post cards (6,153) and the voters who were later reactivated (18,117) is 24,270. That number represents 7% of the voters who were sent notices in 2017.

35. This number does not represent “unreliability” in the ERIC data. The ERIC report covers voters who submitted an address different than their voter registration address in an official
government transaction. The fact that a voter reported a different address to a government agency is a “reliable” indicator that the voter may have moved, even if it turns out that the voter did not actually move.

36. Because these voters had reported two different addresses for themselves, the State of Wisconsin had a legitimate reason to ask these voters to confirm the address on their voter registration which is what the November 2017 notice asked the voters to do.

37. All that can be said about these 24,270 voters is that they reported an address different from their voter registration address in an official government transaction but had not actually moved to that second address.

38. The remaining 93% of the voters who received the November 2017 notice: (a) took no steps to maintain their registration at their original address and, either (b) registered to vote at their new address, or (c) have taken no steps to reregister or vote since their registration was deactivated.

39. This would mean that even assuming the 7% was a measure of unreliability (which it is not), the ERIC data from 2017 was still 93% reliable.¹

40. As part of a subsequent staff report prepared for the June 11 2019 WEC meeting (the “June 11th Staff report”), WEC staff also reviewed a subset of the 2017 notices that had been classified as “undeliverable.” A true and correct copy of the June 11th Staff Report is attached hereto as Exhibit C.

¹ It is possible that some part of the voters who have taken no action actually still live at their original address but there is no evidence that supports that possibility. In a later report the staff slightly revised the totals and reported that an additional small number (20) of voters were reactivated as the result of participating in the 2019 Spring Primaries. See, June 11th Staff Report, Ex. C. But this extremely minor change actually supports the reliability of the original ERIC data.
41. WEC staff found that 6% of those voters subsequently voted from their original address (see, June 11th Staff report). So, even if “reliability” is measured by the percentage of voters on the ERIC report who actually moved—rather than whether the ERIC data accurately shows which voters have reported a different address in a government transaction—the ERIC Movers report was still highly reliable (94%) for the subset of notices that were “undeliverable.”

42. After reviewing the data described in Paragraphs 31 through 41 above, the March 11th Staff Report concluded that “the in-state movers data is a largely accurate indicator of someone who has moved or who provided information to the post office or DMV which makes it appear that they moved.” (See, Exhibit A at page 10.)

43. WEC received a new ERIC Movers report in 2019.

44. WEC staff again reviewed and vetted the information prior to taking any action on the ERIC report. See, WEC Training Materials for 2019 Movers Mailing WisVote Webinar (the “Training Materials”). A true and correct copy of the Training Materials is attached hereto as Exhibit D.

45. Among other things, WEC staff identified and reviewed the potential matches between the ERIC Movers report and Wisconsin’s voter registration list, made sure no military voters were on the list, made sure that no voters were on the list who had received a notice during the 4 year maintenance process, checked for data quality issues, and reviewed the address information for accuracy. (Training Materials, Ex. D)

46. After taking those steps to confirm the accuracy of the ERIC report, WEC staff, as a matter of fact, again relied on the report to send notices as described in paragraph 8 above to approximately 234,039 Wisconsin voters between October 7 and October 11, 2019 (the “October
2019 Notices". See, WEC Memo to Clerks dated October 4, 2019. A true and correct copy of
the WEC October 4, 2019 memo is attached hereto as Exhibit E.

47. Other states that have so-called "top down" systems meaning that the state’s voter
registration system is maintained by the state and used by municipalities (as opposed to being
maintained by the local municipalities) rely upon the ERIC Movers report to change the
registration status of voters if the voter does not respond to a notice sent to the voter following the
state’s receipt of the ERIC Movers Report. (See, March 11th Staff Report at pages 6-7 for Virginia
and 7-8 for Minnesota.)

THE WEC COMMISSIONERS’ UNLAWFUL CONDUCT

48. Under Wis. Stat. § 6.50(3), voters who received a notice from WEC as set forth in
paragraph 46 have three options: (a) if they moved, reregister at their new address in advance of
the next election or on election day, (b) if they have not moved, return the form provided by WEC
within 30 days affirming that they still live at their voter registration address or do so on-line at
MyVote (in which case no action is taken to change their registration status) or (c) if they have not
moved and take no action to continue their active registration status at their existing address within
30 days, have their voter registration status changed from active to inactive and then reregister at
their existing address in advance of the next election or at the polls the next time the voter votes.

49. Reregistering presents no hardship on the voter because the voter can do so at the
polls on election day. Each voter needs to bring their Voter ID to the polls to vote in any event
and given that the voter has not moved from their previous residence their Voter ID will likely
match their voter registration address but, if not, the voter can use a variety of other forms of proof
of residence.
50. The WEC Commissioners decided at their June 11, 2019 meeting, however, not to enforce the 30 day requirement contained in Wis. Stat. § 6.50(3) with respect to the October 2019 Notices. Further, based on the Training Materials (Exhibit D) and the October 4, 2019 WEC memo (Exhibit E), WEC is complying with the WEC Commissioners’ decision and is not intending to enforce Wis. Stat. § 6.50(3) with respect to the October, 2019 Notices.

51. The WEC Commissioners’ decision not to enforce the statute is contrary to Wisconsin law and an abuse of their discretion for three independent reasons.

52. First, the WEC Commissioners’ decision clearly conflicts with state law. WEC’s duty under Wis. Stat. § 6.50(3) to change an elector’s registration from eligible to ineligible when the statutory conditions are met is mandatory, not discretionary, and there is no provision in the law permitting the WEC Commissioners to cause WEC to wait up to two years before executing this task.

53. Second, while WEC has the statutory power to promulgate rules under chapter 227, see, Wis. Stat. § 5.05(1)(f), in exercising that power WEC must comply with the requirements of Chapter 227. The WEC Commissioners did not do so.

54. Wis. Stat. § 227.10(1) requires that “[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.”

55. The WEC Commissioners, on behalf of WEC, were interpreting several Wisconsin Statutes when they made the decision at their June 11, 2019 meeting not to enforce Wis. Stat. § 6.50(3), including but not limited to Wisconsin Statutes §§ 5.05(15), 6.361(1)(ae) and 6.50(3). (See, March 11th Staff Report, Ex. A, pages 10-11.)
56. Moreover, the WEC Commissioners then adopted a statement of general policy applicable to the entire State of Wisconsin, which policy was to not enforce Wis. Stat. §6.50(3).

57. As part of their statutory duties, therefore, the WEC Commissioners and WEC were obligated to promulgate their interpretation of parts of Chapters 5 or 6 and the new statement of policy as a rule, but they violated that statutory duty.

58. The WEC Commissioners were aware that the new statement of policy required a statutory change or a new rule because that subject was raised by WEC staff in the March 11 th Staff Report. (See, Exhibit A, page 11; “staff believes any such long-term process should be reflected in either the agency’s administrative rules or the Statutes.”) But the WEC Commissioners acted without promulgating a rule.

59. Third, the WEC Commissioners may not promulgate a rule which conflicts with state law. See, Wis. Stat. § 227.10(2) (“No agency may promulgate a rule which conflicts with state law.”) Thus, while WEC (through the action of the WEC Commissioners) has the power to interpret Wis. Stat. § 6.50(3)(and other statutes), the WEC Commissioners violated the law and abused their discretion when they interpreted the statutes in a way directly inconsistent with § 6.50(3). Seider v. O’Connell, 2000 WI 76, ¶ 28, 236 Wis. 2d 211, 612 N.W.2d 659 (“An administrative rule that conflicts with an unambiguous statute exceeds the authority of the agency that promulgated it.”)

60. The decision of the WEC Commissioners’ at their June 11, 2019 meeting not to comply with Wis. Stat. § 6.50(3) and their violations of Chapter 227 are all contrary to law, and/or abuses of discretion and, thus, actionable under Wis. Stat. § 5.06.

**PRAYER FOR RELIEF**

WHEREFORE, the Complainants request the following relief:
A. That WEC revokes the decision made by the WEC Commissioners at their June 11, 2019 meeting not to enforce Wis. Stat. § 6.50(3) as written.

B. That WEC change the registration status from eligible to ineligible for each voter who received the October 2019 notice and who did not respond to the notice within 30 days.

C. That WEC grant the relief in Subparagraphs A and B above in time for WisVote to be updated prior to the Spring Primary scheduled for February 18, 2020.

D. That no later than 5 days after receiving this complaint, WEC notify each of the Respondents of the complaint and provide them with a copy and ask them to respond in writing to the complaint within 15 days after receiving the notice and that WEC provide a copy of such response(s) to counsel for the Complainants.

E. That WEC determine the remainder of the process to be followed for responding to this Complaint given that the WEC Commissioners are the Respondents and advise the Complainants of that process no later than October 31, 2019.

E. Such equitable or other relief as is just and appropriate.

Respectfully submitted this 13 day of October, 2019.

WISCONSIN INSTITUTE FOR LAW & LIBERTY, Inc.
Attorneys for Complainants

[Signature]

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The Complainants, Timothy Zignego, David Opitz and Frederick Luehrs, III, being first duly sworn, state that they have personally read the above complaint, and that the above allegations are based on information and belief and the complainants believe them to be true.

Tim Zignego

Subscribed and sworn to before me this 14th day of October, 2019.

Notary Public, State of Wisconsin
My Commission expires

David Opitz

Subscribed and sworn to before me this 14th day of October, 2019.

Notary Public, State of Wisconsin
My Commission expires

Frederick Luehrs, III

Subscribed and sworn to before me this 14th day of October, 2019.

Notary Public, State of Wisconsin
My Commission expires